

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 26, 2006 Session

JERRY ALLEN McFARLAND v. PAT NICHOLS (JOYNER) McFARLAND

Appeal from the Chancery Court for Wilson County
No. 04019 C.K. Smith, Chancellor

No. M2005-01260-COA-R3-CV - Filed on August 6, 2007

This appeal involves the division of a marital estate following the dissolution of a fifteen-year marriage. Both parties sought a divorce in the Chancery Court for Wilson County. Following a bench trial, the trial court granted the wife a divorce and then classified and divided the parties' marital estate. On this appeal, the wife takes issue with the trial court's conclusion that she did not contribute substantially to the preservation or appreciation of the husband's separate property. The husband takes issue with the trial court's calculation of the parties' interests in the wife's anticipated National Guard pension. We conclude that the trial court correctly determined that the wife did not substantially contribute to the preservation or appreciation of the husband's separate property. Additionally, we find that the trial court did not err by deciding to divide the wife's anticipated National Guard retirement benefits using the deferred distribution method. However, we find that the trial court erred in its application of the deferred distribution method by failing to allow the husband to share in any future increases in the retirement benefit and by failing to take into account that the wife's continued service in the National Guard after the divorce will reduce the husband's share of the retirement benefit when she begins drawing it.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Modified and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Phillip E. Smith, Nashville, Tennessee, for the appellant, Pat Nichols (Joyner) McFarland.

Shawn J. McBrien, Lebanon, Tennessee, for the appellee, Jerry Allen McFarland.

OPINION

I.

Jerry McFarland and Patricia McFarland met in 1988 when they participated in a flight on a Tennessee National Guard aircraft intended to demonstrate to employers of National Guard members that their employees were working hard and learning valuable skills during their National

Guard service. Mr. McFarland, then 45 years old, was an active duty officer in the National Guard. Ms. McFarland, who was a 38-year-old nurse, was a new recruit. They began seeing each other socially and then romantically. Following the parties' marriage in 1990, Ms. McFarland moved from Chattanooga to Wilson County where the couple lived at Robin Roost, Mr. McFarland's ancestral family farm.

Mr. McFarland retired from the National Guard in 1999 with more than thirty years of military service. He began drawing a military pension and also became Director of the Wilson County Emergency Management Agency. Working on the farm was Mr. McFarland's time-consuming second job. Ms. McFarland worked as an obstetrics nurse and also continued to serve as a major in the National Guard.

Mr. McFarland had been married three times before he married Ms. McFarland. Ms. McFarland had an adult child from a previous relationship. Following their marriage, the McFarlands kept their financial affairs strictly separate. Mr. McFarland deposited his county salary and his retirement benefits into his own separate checking and savings accounts. He maintained the separate account for the farm that had been established before the marriage. Ms. McFarland did not have access to the farm account, nor did she have any ownership interest in the farm or the farming operations. Similarly, Ms. McFarland kept her hospital salary and the National Guard salary in her own accounts.

Even though they maintained separate accounts, both Mr. McFarland and Ms. McFarland contributed to household expenses. Mr. McFarland "paid most of the household expenses during the marriage from his income," including the majority of the utilities and groceries. He also did most of the cooking. Ms. McFarland, however, paid some utilities and carried an insurance policy through her work that provided health insurance coverage for Mr. McFarland and, for a period of time, Mr. McFarland's children from previous relationships. Ms. McFarland also paid for a series of maids to keep the farmhouse clean.

Mr. McFarland and his two siblings had also inherited a small house on lakefront property from their mother. During the marriage, Mr. McFarland purchased his siblings' interests in the property using borrowed funds and rented the property to long-term tenants. Between 1994 and 2004, the value of this property increased from \$110,000 to \$180,000 primarily as a result of the rising value of lakefront property in the area and the tenants' improvement of a utility area into "finished" space. Ms. McFarland's involvement with the lakefront property was extremely limited. On one occasion, she mowed the grass and cleaned the house before new renters arrived.

Mr. McFarland's time-consuming passion, one that Ms. McFarland did not share, was his 200-acre ancestral family farm. His family obtained the property through a land grant from the State of North Carolina in the late Eighteenth Century and occupied and farmed it without interruption for more than two hundred years. Mr. McFarland possesses a life estate in the farm and owns a one-third interest. His children from his earlier marriages own the remaining two-thirds interest. Mr. McFarland operates it as a cattle farm replete with fences, barns, sheds, and farming equipment.

The primary business of Robin Roost is cattle. Mr. McFarland focuses on calf-cow production where cattle are bred and calves are raised until they are old enough to be weaned and then eventually sold. However, he also grows a small amount of tobacco, as well as a great deal of hay which he uses to feed his livestock and as an additional source of revenue.

Mr. McFarland works the farm with the help of neighbors and two young men who regard the McFarlands as parental figures. Mr. McFarland describes Robin Roost as “part of me and part of my way of life and . . . just something in your blood.” Ms. McFarland never shared Mr. McFarland’s passion for the farm. In early years of the marriage, Ms. McFarland would periodically help with farm chores. As the years went by, Ms. McFarland’s involvement increasingly diminished. While Mr. McFarland was constantly working and drew vitality from farm work, Ms. McFarland preferred to enjoy the limited free time that she had in pursuit of leisure. She would rather read than cut and bail hay.

An approximately 3,500 square foot farmhouse originally constructed on this property in 1912 provided the home in which Mr. McFarland and Ms. McFarland resided during their marriage. Their home was an epicenter for the gathering of family, friends, and neighbors. Sometimes overwhelmingly so, because Mr. McFarland frequently provided keys to family friends so that they could stop-by at any time. This resulted in Ms. McFarland finding unexpected visitors in her home when she awoke in the morning.

During their marriage, the parties built an addition to the nearly century-old farmhouse. The addition included a sunroom with a jacuzzi, a bathroom, and a closet. The cost was between \$35,000 and \$37,000. Mr. McFarland used money from an inheritance from his father to pay approximately \$27,000 to \$29,000 of the cost. The parties borrowed \$9,000 to pay off the balance. Ms. McFarland made all of the payments on this loan except for one payment made by Mr. McFarland.

When the case came to trial, the parties presented Mark Conner as their joint expert regarding the value of the farm. Mr. Conner testified that the value of the farm increased from \$500,000 in 1990 to \$1,100,000 by 2004. Accordingly to Mr. Conner, the value of the property increased as a result of market forces. During the fourteen-year interval, the value of land for purposes of residential development had risen dramatically in Wilson County. Mr. Conner testified that should a developer acquire the property, all the existing structures would be razed and a new residential development would be constructed. Based on Mr. Conner’s testimony, the trial court concluded that the “improvements to the house, barn and fences had nothing to do with the increase in value of the farm . . .”

The trial court heard the case without a jury on January 27 and 28, 2005. Based on the evidence, the trial court granted Ms. McFarland a divorce on the ground of adultery. The court also concluded that the Robin Roost farm and the lakeside house were Mr. McFarland’s separate property and that Ms. McFarland had not substantially contributed to the preservation or appreciation of either property.

Two weeks later, on February 10, 2005, the trial court conducted another hearing focusing primarily on the parties' National Guard retirement benefits. Mr. McFarland favored reducing both parties' anticipated retirement benefits to their present cash value and also insisted that Ms. McFarland's retirement should be calculated based on the assumption that she would retire from the National Guard as a lieutenant colonel rather than at her present rank of major. Ms. McFarland proposed using the deferred compensation approach because of the present uncertainties regarding when she would retire and her rank at retirement.

The trial court decided to use the deferred compensation method. It found "that eighty-three (83%) percent of [Ms. McFarland's] retirement benefit at the time of vesting at her present rank of Major is marital property[, and] . . . that [Ms. McFarland's retirement] should vest at fifty-eight (58) years of age." Accordingly, the trial court determined Mr. McFarland "shall be entitled to one half (½) of the eighty-three (83%) percent of the gross monthly benefit upon [Ms. McFarland] being eligible to draw retirement which is anticipated at sixty (60) years of age." Mr. McFarland filed a motion to alter or amend arguing that the trial court should have reduced the pensions to a present cash value. The trial court denied this motion.

On this appeal, Ms. McFarland argues that the trial court erred by determining that she did not substantially contribute to the preservation and appreciation of the Robin Roost farm and the lake house. She insists that the increased value of these properties, particularly the farm, during the marriage constitutes marital property. For his part, Mr. McFarland raises two issues regarding the valuation of Ms. McFarland's National Guard pension. First, he argues that the trial court should have employed the present cash value approach to divide the parties' interests in their National Guard pensions. Second, he insists that the trial court erred by limiting his share of Ms. McFarland's National Guard pension to a portion of the benefit she would receive if she retired at her present rank of major at the age of fifty-eight.

II.

Dividing a marital estate necessarily begins with the systematic identification of all of the parties' property interests. 19 W. Walton Garrett, *Tennessee Practice: Tennessee Divorce, Alimony and Child Custody* § 15:2, at 321 (rev. ed. 2004) ("*Tennessee Divorce*"). The second step is to classify each of these property interests as either separate or marital property. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005); *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998). Tennessee is a "dual property" state. *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002). Accordingly, property cannot be included in the marital estate unless it fits within the definition of "marital property" in Tenn. Code Ann. § 36-4-121(b)(1)(A) (2005). By the same token, "separate property," as defined in Tenn. Code Ann. § 36-4-121(b)(2), should not be included in the marital estate.

The dividing line between marital and separate property frequently becomes blurred. Marital property can become separate property when one spouse gives it to the other spouse. *Kinard v. Kinard*, 986 S.W.2d 220, 232 (Tenn. Ct. App. 1998); *Hanover v. Hanover*, 775 S.W.2d 612, 617 (Tenn. Ct. App. 1989). On the other hand, separate property can become marital property either

through commingling¹ or transmutation.² Even if an asset is clearly separate property, the increase in the asset's value during the marriage and the income from the asset may be considered marital property if the nonowner spouse contributed substantially to the asset's preservation and appreciation. Tenn. Code Ann. § 36-4-121(b)(1)(B); *Cohen v. Cohen*, 937 S.W.2d 823, 832-33 (Tenn. 1996); *Harrison v. Harrison*, 912 S.W.2d 124, 127 (Tenn. 1995). Contributions to the preservation or appreciation of a separate asset will be considered "substantial" if they are real and significant. *Mitts v. Mitts*, 39 S.W.3d 142, 145 (Tenn. Ct. App. 2000); *Brown v. Brown*, 913 S.W.2d 163, 167 (Tenn. Ct. App. 1994).

Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual. *Current v. Current*, No. M2004-02678-COA-R3-CV, 2006 WL 656791, at *1 (Tenn. Ct. App. Mar. 15, 2006) (No Tenn. R. App. P. 11 application filed); *Bilyeu v. Bilyeu*, No. M2003-00294-COA-R3-CV, 2005 WL 3190338, at *3 (Tenn. Ct. App. Nov. 28, 2005), *perm. app. denied* (Tenn. June 12, 2006); *Tennessee Divorce* § 15:3, at 324. Accordingly, the appellate courts review a trial court's decisions classifying property using the familiar standard of review in Tenn. R. App. P. 13(d).

As a general rule, assets acquired by either spouse during the marriage are presumed to be marital property. Tenn. Code Ann. § 36-4-121(b)(1)(A); *Church v. Church*, No. M2004-02702-COA-R3-CV, 2006 WL 2168271, at *7 (Tenn. Ct. App. Aug. 1, 2006) (No Tenn. R. App. P. 11 application filed); *Hunter v. Hunter*, No. M2002-02560-COA-R3-CV, 2005 WL 1469465, at *4 (Tenn. Ct. App. June 21, 2005) (No Tenn. R. App. P. 11 application filed); *Tennessee Divorce* § 15:4, at 333, and, similarly, assets acquired by either spouse prior to the marriage are presumed to be separate property. Tenn. Code Ann. § 36-4-121(b)(2)(A). Thus, the classification of all assets acquired by either spouse during the marriage begins with the presumption that the asset is marital. *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *4 (Tenn. Ct. App. Sept. 1, 2006) (No Tenn. R. App. P. 11 application filed). A party asserting that an asset acquired during the marriage is separate property has the burden of proving by a preponderance of the evidence that the asset is separate property. *Goulet v. Heede*, No. E2000-02535-COA-R3-CV, 2002 WL 126279, at *5 (Tenn. Ct. App. Jan. 31, 2002) (No Tenn. R. App. P. 11 application filed); *Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998). The types of evidence that will be sufficient to rebut the presumption that an asset acquired during the marriage is marital property are found in Tenn. Code Ann. § 36-4-121(b)(2)(B)-(F).

¹ Separate property becomes marital property if it is inextricably commingled with marital property or with the separate property of the other spouse. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002); *Smith v. Smith*, 93 S.W.3d at 878.

² Transmutation of a separate asset into a marital asset occurs when the separate asset is jointly titled or when the parties use it in support of the marriage or in some other manner that demonstrates the parties' intent to make the asset marital property. *Elkridge v. Elkridge*, 137 S.W.3d 1, 13-14 (Tenn. Ct. App. 2002); *Batson v. Batson*, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988); 3 John Tingely & Nicholas B. Svalina, *Marital Property Law* § 43:11, at 43-118 (rev.2d ed. 2006) ("*Marital Property Law*").

After a trial court has classified the parties' property as either marital or separate, it should place a reasonable value on each piece of property subject to division. *Davidson v. Davidson*, No. M2003-01839-COA-R3-CV, 2005 WL 2860270, at * 2 (Tenn. Ct. App. Oct. 31, 2005) (No Tenn. R. App. P. 11 application filed); *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003) (No Tenn. R. App. P. 11 application filed). The parties themselves must come forward with competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d at 231; *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values represented by all the relevant valuation evidence. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997); *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). Decisions regarding the value of marital property are questions of fact. *Kinard v. Kinard*, 986 S.W.2d at 231. Accordingly, they are entitled to great weight on appeal and will not be second-guessed unless they are not supported by a preponderance of the evidence. *Smith v. Smith*, 93 S.W.3d at 875; *Ray v. Ray*, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995).

III.

Ms. McFarland does not take issue on this appeal with the trial court's decision to classify both the Robin Roost farm and the lake house as Mr. McFarland's separate property. Rather, she has limited herself to the narrow argument that the trial court misapplied Tenn. Code Ann. § 36-4-121(b)(1)(B) by concluding that the increase in value of the Robin Roost farm was entirely market driven and that the increase in value of the lake house was primarily market driven. Ms. McFarland insists that the increase in value of these two pieces of property during the marriage was due, at least in part, to her own substantial contributions. Ms. McFarland's argument is not supported by the evidence.

A.

Ms. McFarland relies heavily on the fact that the parties used the farm house at Robin Roost as their marital home. She points out that she contributed to the upkeep of the farm house by contributing more than \$9,000 dollars to its renovation, by purchasing \$8,000 worth of furniture for the house, by hiring a housekeeper to clean the house, by paying the cable and Internet bills. She also points out that she mowed the grass, landscaped the yard, washed clothes, ironed shirts, and purchased groceries. Ms. McFarland insists that, taken as a whole, these contributions to the marital home are easily substantial under well-established law.

Ms. McFarland concedes that the courts have required some link between a spouse's effort and the appreciation in the other spouse's separate property. Nonetheless, she asserts that this linkage should be required only with regard to investment property and that it should not be required with regard to the marital home. Because the Robin Roost farm was the parties' marital home, Ms. McFarland, relying on dicta from *Langschmidt v. Langschmidt*, 81 S.W. 3d 741 (Tenn. 2002) and *Silvey v. Silvey*, No. E2003-00586-COA-R3-CV, 2004 WL 508481 (Tenn. Ct. App. Mar. 16, 2004) (No Tenn. R. App. P. 11 application filed), insists that her activities may still be classified as substantial contributions to the preservation and appreciation of the Robin Roost farm even if the increase was largely or even solely caused by market forces.

Even if the evidence of Ms. McFarland's activities would under most circumstances be sufficient to show a direct or indirect substantial contribution to the preservation and appreciation in the value of a marital home, Ms. McFarland has, nevertheless, not managed to overcome the disconnect between her argument on appeal and the trial court's factual findings or the evidence presented at trial regarding the reasons for the current value of these properties. Furthermore, Ms. McFarland reads *Langschmidt* and *Silvey* too broadly. These decisions do not create an exception to the requirement of a link between a spouse's contributions and the appreciation of the property. Simply stated, factually and legally, Ms. McFarland has failed to show that her actions constitute a substantial contribution pursuant to Tenn. Code Ann. § 36-4-121(b)(1)(B).

Increases in the value of separate property during a marriage will not be considered to be marital property unless the parties "substantially contributed" to the appreciation in the value of the property. Tenn. Code Ann. § 36-4-121(b)(1)(B); *Harrison v. Harrison*, 912 S.W.2d at 127. While these contributions may be either "direct" or "indirect," Tenn. Code Ann. § 36-4-121(b)(1)(D), they must satisfy two requirements. First, the contributions must be "real and significant." *Fox v. Fox*, 2006 WL 2535407, at * 3; *Swett v. Swett*, M1998-00961-COA-R3-CV, 2002 WL 1389614, at *10 (Tenn. Ct. App. June 27, 2002) (No Tenn. R. App. P. 11 application filed); *Brown v. Brown*, 913 S.W.2d at 167. Second, there must be some link between the spouses' contributions and the appreciation in the value of the separate property. *Langschmidt v. Langschmidt*, 81 S.W.3d at 746.³

When separate property increases in value with no contribution from either spouse, that increase remains the separate property of the spouse who owns the property, no matter how great the other spouse's contribution to the marriage may have been. *Avery v. Avery*, No. M2000-00889-COA-R3-CV, 2001 WL 775604, at * 10 (Tenn. Ct. App. July 11, 2001) (No Tenn. R. App. P. 11 application filed). Thus, when a spouse is asserting that his or her indirect contributions resulted in the appreciation of the other spouse's property, the pivotal inquiry is whether there was an appreciation in the value of the separate property due to the efforts of the spouse who owned it which were aided or facilitated in some way by the indirect contributions of the other spouse. *Price v. Price*, 503 N.E.2d 684, 690 (N.Y. 1986).⁴

In this case, neither Ms. McFarland nor Mr. McFarland engaged in efforts that led to the preservation and appreciation of the property. The trial court concluded that "the sole basis for the increase in the value of the real property to [the] value testified to was market driven forces." Furthermore, "the improvements to the house, barn and fences had nothing to do with the increase in value of the farm set forth by the testimony but that the increase . . . was market driven."

³Linda D. Elrod and Robert G. Spector, *A Review of the Year in Family Law: Increased Mobility Creates Conflicts*, 36 Fam. L.Q. 515, 553 (2003). (Citing *Langschmidt*, the authors stated that "Tennessee held that a spouse claiming a 'substantial contribution' to an otherwise separate asset must show a link between the spouse's marital efforts and the preservation and appreciation of the asset in order for the appreciation of the asset to be classified as marital property.").

⁴See also *Carniol v. Carniol*, 762 N.Y.S.2d 619, 620 (App. Div. 2003); *Mahlab v. Mahlab*, 531 N.Y.S.2d 580, 581 (App. Div. 1988); *Shahidi v. Shahidi*, 514 N.Y.S.2d 259, 262 (App. Div. 1987).

The testimony of the parties' joint appraiser, Mark Conner,⁵ provides ample support for the trial court's conclusion that the appreciation in the value of the Robin Roost farm was market-driven. Mr. Conner testified that the \$600,000 increase in the value of the farm between 1990 and 2004 was "an increase in land value I think you would see the same, at the very minimum percentage increase if the land were vacant and unimproved." When questioned regarding the effect of the farm house, the barn, and the other structures on the value of the property, Mr. Conner responded, "No, as far as the barns and those types of things, I think to a developer they could actually be viewed as a liability if a person is buying the land to develop. I mean if you're going to do that you would bulldoze those things down anyway." With specific regard to the farm house, Mr. Conner testified that he did not "separate out that particular improvement." He determined the value of the property without assigning any value to the farm house. Thus, the trial court's conclusion that the improvements to the land had nothing to do with its increase in value finds ample support in the record.⁶

Tennessee courts have consistently indicated that where "the appreciation is due solely to market factors and not to efforts of either spouse, the increase in value will not be considered marital property." *Morgan v. Morgan*, No. M2002-00793-COA-R3-CV, 2003 WL 22037325, at *3 (Tenn. Ct. App. Aug. 29, 2003) (No Tenn. R. App. P. 11 application filed); *Cooke v. Cooke*, No. M2001-03026-COA-R3-CV, 2003 WL 21392003, at *4 (Tenn. Ct. App. June 17, 2003) (No Tenn. R. App. P. 11 application filed); *see also Raulston v. Raulston*, No. E2005-02463-COA-R3-CV, 2006 WL 2737996, at *3 (Tenn. Ct. App. Sept. 26, 2006) (No Tenn. R. App. P. 11 application filed) ("Appreciation which is purely market-driven does not constitute a substantial contribution by a spouse."). Because the appreciation in the value of the Robin Roost farm resulted from the increased value of land for purposes of residential development and did not result from the efforts of either Mr. McFarland or Ms. McFarland, there is no basis upon which to find that Ms. McFarland substantially contributed to both the preservation and appreciation of the property.

This outcome is consistent with the decisions in three similar cases. In *Clement v. Clement*, the increased value of the property resulted from inflation and market forces, rather than from improvements to the farm. *Clement v. Clement*, No. W2003-02388-COA-R3-CV, 2004 WL 3396472, at *14-15 (Tenn. Ct. App. Dec. 30, 2004) *perm. app. denied* (Tenn. June 27 & Aug. 29, 2005). Accordingly, this court found that there was "no substantial contribution by either Mr. Clement or Ms. Clement to the appreciation in value of the property, but rather, it appears that the appreciation in value was due solely to market forces and inflation." *Clement v. Clement*, 2004 WL

⁵ Ms. McFarland notes in her appellate brief that "[d]uring the pendency of the litigation, the parties hired an appraiser, Mark Conner" Mr. Conner also testified that he had been requested to appraise the property by both parties.

⁶ The record contains testimony that could support a finding that the value of the farm house itself increased as a result of the parties' efforts. Ms. McFarland presented the State of Tennessee Real Estate Appraisal card for the farm that valued the improvements on the farm at the time of the McFarlands' marriage at approximately \$80,000. By 2004, the value of these improvements increased to \$121,000. These appraisal cards both place the total value of the land substantially below, less than half, the valuation arrived at by Mr. Conner. However, both before the trial court and in her brief on appeal, Ms. McFarland has relied on Mark Conner's valuation methodology that assesses the value of the property as an integrated whole pursuant to which the "marital home" is of no discernable value.

3396472, at *15. We concluded that “the appreciation constitutes a passive increase in value that cannot be attributed, in any part, to Ms. Clement’s contributions as a homemaker. Therefore, the appreciation in the value of Parkin Farm cannot be deemed marital property.” *Clement v. Clement*, 2004 WL 3396472, at *15.

In *Mitts v. Mitts*, this court found that the husband’s “efforts in his role as general manager - and Wife’s efforts in her role as parent and homemaker - most certainly contributed, directly or indirectly, to the success of the golf course and the country club.” *Mitts v. Mitts*, 39 S.W.3d at 146. However, we declined to find that the wife had substantially contributed to the increased value of the separate property because “the increase in value of the corporation’s stock resulted not from the golf course and country club but rather from the attractiveness of the raw land as *developable residential property*.” *Mitts v. Mitts*, 39 S.W.3d at 146 (emphasis in original). Therefore, “[n]either party by his or her efforts, directly or indirectly, contributed to the increase in value of the underlying property,” and the property was properly classified as a separate property. *Mitts v. Mitts*, 39 S.W.3d at 146.

Similarly, in *Arp v. Arp*, this court declined to classify the increased value in separate property as marital property because the appreciation was caused by the location of the property, the extension of public utilities to the property, and the local economy, rather than any of the efforts of either spouse. Accordingly, we concluded that “there is no basis to classify this as marital property, since the wife made no contribution to the properties’ increase in value.” *Arp v. Arp*, No. 03A01-9808-CV-00273, 1999 WL 427610, at *2 (Tenn. Ct. App. June 18, 1999) (No Tenn. R. App. P. 11 application filed).

We now turn to *Langschmidt v. Langschmidt* to consider Ms. McFarland’s contention that the requirement of linkage between the parties’ contributions and the appreciation in the value of the property is not applicable to marital homes. Ms. McFarland identifies the following language in *Langschmidt v. Langschmidt* as creating such an exception:

For example, appreciation in value of the marital residence (titled separately in the name of one spouse prior to and during the marriage) is marital property once it is shown that the other spouse substantially contributed to the home’s preservation and appreciation as a result of efforts made as a homemaker or payment of the mortgage from a joint marital checking account, or other such contributions. Such a result, however, would not be the case if a spouse’s separately-owned rental property in another state appreciated in value during the marriage absent a showing that the other spouse substantially contributed to the investment property’s preservation and appreciation in value during the marriage.

Langschmidt v. Langschmidt, 81 S.W.3d at 746-47.

It is readily apparent from the use of the “for example” introduction that the next sentence is an illustration of some previous point or principle. The principle that is being illustrated is, in fact, set forth in the sentence immediately preceding the quoted language: “[A]lthough it is certainly clear that Tennessee courts recognize a homemaker’s contribution when making a determination of marital property, in the spirit of *Harrison*, we require that some link between the marital efforts of a spouse and the appreciation of the separate property must be established before the separate property’s appreciation is considered marital property.” *Langschmidt v. Langschmidt*, 81 S.W.3d at 746 (internal citations omitted). The language referenced by Ms. McFarland does not create an exception from the linkage requirement; rather, it is an illustration thereof. Furthermore, while Ms. McFarland is correct that an indirect contribution is sufficient to show such a link, she has failed to show that she made an indirect contribution to the appreciation of the farm. The trial court’s finding is essentially that the land could have been allowed to sit without any efforts being exerted thereupon and it would have experienced the same increase in value if not a greater increase. There was no effort by either spouse which resulted in the appreciation of the value of the land; the increase was simply a result of the changed market. Accordingly, Ms. McFarland could not have substantially contributed directly or indirectly to the preservation and appreciation of the farm.

Ms. McFarland’s reliance on *Silvey v. Silvey*, 2004 WL 508481, at *4-6 is also misplaced. In *Silvey*, this court was confronted with a trial court’s factual finding that a wife had substantially contributed to the preservation and appreciation of a couple’s marital home. *Silvey v. Silvey*, 2004 WL 508481, at *4-6. The trial court had found that “some increase in the property’s value was attributable to repairs made by both parties.” *Silvey v. Silvey*, 2004 WL 508481, at *4. The husband argued that this conclusion was “mere speculation.” *Silvey v. Silvey*, 2004 WL 508481, at *4. This court upheld the trial court’s finding that the wife made a substantial contribution based upon her efforts in “clean[ing] and maintain[ing] the home place.” *Silvey v. Silvey*, 2004 WL 508481, at *6. Therefore, we concluded that “[w]e cannot say that the evidence taken as a whole preponderates against a finding that she substantially contributed to the preservation and appreciation of the marital residence and that the increase in its value during the marriage is appropriately characterized as marital property.” *Silvey v. Silvey*, 2004 WL 508481, at *6.

The *Silvey* court did draw a distinction between efforts as a homemaker with regard to the appreciation of the marital home and “the appreciation in the value of financial accounts or rental property in another state.” *Silvey v. Silvey*, 2004 WL 508481, at *5-6. This distinction, however, relates to the generally easier evidentiary showing of a substantial contribution made as a homemaker to the preservation and appreciation of the prototypical residential marital home than an investment property.⁷ The court did not create an exception to the requirement that the contribution be linked directly or indirectly to the preservation and appreciation of the property. Quite to the contrary, the court stated “[w]e construe [the *Langschmidt*] language to mean that there must be some meaningful relationship between the actions of the non-owner spouse and the property in question in order for

⁷ While it may be more difficult in some cases to show the connection between being a homemaker and the increase in value of an investment property, it would be a mistake to assume that a substantial contribution to investment property cannot be shown whether as a homemaker or otherwise. See e.g., *Avery v. Avery*, 2001 WL 775604, at *10; *Schuett v. Schuett*, No. W2003-00337-COA-R3-CV, 2004 WL 689917, at *3 (Tenn. Ct. App. Mar. 31, 2004) *perm. app. denied* (Tenn. Nov. 15, 2004).

the increase in the value of the property to be categorized as marital property.” *Silvey v. Silvey*, 2004 WL 508481, at *6.

Furthermore, this court noted in *Silvey v. Silvey* that even where a spouse’s efforts as a homemaker are not related to appreciation of investment property, these efforts may, nevertheless, “be causally related to a post-marriage increase in value of a residence owned by the [other spouse] at the time of marriage.” *Silvey v. Silvey*, 2004 WL 508481, at *6. Thus, while the *Silvey* court envisioned circumstances where a contribution could be linked with the preservation and appreciation of the marital home but not investment property, the court did not remove the requirement of such a link. We cannot agree with Ms. McFarland that *Silvey v. Silvey* constitutes an abandonment of the logically reflexive gateway restriction that the efforts of at least one of the spouses must have contributed to the preservation and appreciation of the property in order for the other spouse to have directly or indirectly substantially contributed to the preservation and appreciation of the property. *Silvey v. Silvey* simply acknowledged that it may be easier to make the necessary factual showing if the asserted contribution is as a homemaker where the contribution is being made to increase the value of a marital home rather than an investment property.⁸ Because neither spouses’ efforts contributed to preservation and appreciation of the property, we conclude that the trial court did not err in concluding that Ms. McFarland did not substantially contribute to the preservation and appreciation of the farm with accompanying farmhouse property.

B.

Ms. McFarland also asserts that the trial court erred by concluding that she did not make a substantial contribution to the preservation and appreciation of the lake house property. She argues that she contributed to the preservation and appreciation of the property by cleaning the house and by mowing the grass before tenants moved in. The trial court did not consider these contributions to be substantial, and neither do we.⁹

The trial court concluded that the lake house is Mr. McFarland’s separate property and determined that the increased value of the property resulted primarily from market-driven forces. Mr. Conner, the parties’ appraiser, testified that the increase in the value of the lake house property resulted primarily from market forces and, to a lesser extent, from an addition to the house constructed by persons residing in the house under a long-term lease. However, while the value of the property as a whole may have increased due to market forces, to find that the increased value was

⁸ In many prototypical cases involving marital homes, struggling against the natural wear-and-tear on a home may be critical to its preservation and appreciation. Thus, while the market may drive the price upwards, it is underlying maintenance which preserves the property and leads to its appreciation.

⁹ Ms. McFarland mentions in her brief that Mr. McFarland bought out his siblings’ interest in the lake house during the marriage. However, she has not argued that the lake house should have been classified as marital property because Mr. McFarland acquired a two-thirds interest in the property during the marriage. Accordingly, Ms. McFarland has waived her opportunity to challenge the classification of the lake house property as Mr. McFarland’s separate property. *Worley v. White Tire of Tenn., Inc.*, 182 S.W.3d 306, 311 (Tenn. Ct. App. 2005); *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001); *Childress v. Union Realty Co., Ltd.*, 97 S.W. 3d 573, 578 (Tenn. Ct. App. 2002).

market-driven ignores the fact that the value of the property to Mr. McFarland increased significantly as a result of his acquisition of his siblings' two-thirds interest in the property. Consequently, the increase in the value of the property to Mr. McFarland largely resulted not just from "market forces" but from his acquisition of the remaining two-thirds interest in the property. Ms. McFarland has not addressed this increase in value in her argument.

Although contributions need not be commensurate with the appreciation in the property's value during the marriage to qualify as substantial, the contributions must be "real and significant." *Hensley v. Hensley*, No. E2005-02735-COA-R3-CV, 2006 WL 2482970, at *2 (Tenn. Ct. App. Aug. 29, 2006) (No Tenn. R. App. P. 11 application filed); *Brown v. Brown*, 913 S.W.2d at 167; *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 623 (Tenn. Ct. App. 1989). The trial court found that Ms. McFarland did not substantially contribute to the preservation and appreciation of the value of the lake house property. While we do not intend to trivialize her efforts, we simply cannot conclude that the evidence preponderates against the trial court's conclusion that the one-time cleaning and mowing of the grass around the lake house constituted a real and significant contribution to the preservation and appreciation of the lake house.

IV.

Mr. McFarland argues that there are two flaws in the trial court's division of the parties' interests in Ms. McFarland's National Guard pension. First, he insists that the trial court erred by using the deferred distribution method rather than the present cash value method. Second, he insists that the trial court erred by basing the division on Ms. McFarland's rank at the time of trial rather than at the time of retirement. Ms. McFarland defends the trial court's choice of the deferred distribution method and asserts that Mr. McFarland has waived his opportunity to take issue with the trial court's decision to use her rank at the time of trial rather than her rank at retirement. Sensing the weakness of her waiver argument, Ms. McFarland also argues that the portion of her National Guard pension considered to be marital property must be reduced to reflect her additional years of National Guard service after the dissolution of the marriage.

A.

We turn first to Mr. McFarland's assertion that the trial court erred by allocating the parties' interest in Ms. McFarland's National Guard pension using the deferred compensation method. Decisions regarding which method to use are discretionary and depend on the facts of each case. *Cohen v. Cohen*, 937 S.W.2d at 831; *Croley v. Tiede*, No. M1999-00649-COA-R3- CV, 2000 WL 1473854, at *9 (Tenn. Ct. App. Oct. 5, 2000) (No Tenn. R. App. P. 11 application filed); *Kendrick v. Kendrick*, 902 S.W.2d 918, 928 (Tenn. Ct. App. 1994).

The "abuse of discretion" standard is a review-constraining standard that calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *State*

ex rel. Vaughn v. Kaatrude, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Francois v. Willis*, 205 S.W.3d 915, 916 (Tenn. Ct. App. 2006). Appellate courts will conclude that a trial court abused its discretion only when the trial court applies an incorrect legal standard, reaches an illogical decision, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Francois v. Willis*, 205 S.W.3d at 916.

Utilizing the present cash value method “requires the trial court to place a present value on the retirement benefit as of the date of the final decree.” *Cohen v. Cohen*, 937 S.W.2d at 831. This value is determined by taking “the anticipated number of months the employee spouse will collect the benefits (based on life expectancy)” and multiplying that “by the current retirement benefit payable under the plan.” *Cohen v. Cohen*, 937 S.W.2d at 831. This figure, however, “is then discounted to present value allowing for various factors such as mortality, interest, inflation, and any applicable taxes.” *Cohen v. Cohen*, 937 S.W.2d at 831. After calculating the present value, “the court may award the retirement benefits to the employee-spouse and offset that award by distributing to the other spouse some portion of the marital estate that is equivalent to the spouse’s share of the retirement interest.” *Cohen v. Cohen*, 937 S.W.2d at 831. The Tennessee Supreme Court has indicated that the “present cash value method is preferable if the employee-spouse’s retirement benefits can be accurately valued, if retirement is likely to occur in the near future, and if the marital estate includes sufficient assets to offset the award.” *Cohen v. Cohen*, 937 S.W.2d at 831.

However, the Tennessee Supreme Court has also recognized that the present cash value method is not always appropriate. Thus, when vesting or maturation are uncertain or when retirement benefits are the parties’ greatest asset, the Tennessee Supreme Court has recognized that the deferred distribution or retained jurisdiction method may be more appropriate. This method does not require the court to ascertain the present value of the retirement benefit. Rather, it requires the court to prescribe a formula that will be used to apportion the retirement benefit when it becomes payable. The parties’ respective interests in the retirement benefit are generally expressed as a fraction or percentage of the monthly benefit. The percentage is derived by dividing the number of months of the marriage during which the benefits accrued by the total number of months during which the retirement benefits accumulate before being paid. *Cohen v. Cohen*, 937 S.W.2d at 831.¹⁰

The deferred distribution method is particularly advantageous “when the risk of forfeiture is great.” *Cohen v. Cohen*, 937 S.W.2d at 831. It also allows for “an equitable division without requiring present payment for a benefit not yet realized and potentially never obtained” and “equally apportions any risk of forfeiture.” *Cohen v. Cohen*, 937 S.W.2d at 831. A disadvantage of the

¹⁰ The Tennessee Supreme Court has provided the following example of the deferred distribution methodology: “[I]f retirement benefits had accrued during ten years of a twelve year marriage, and if the benefit payments would be payable at the end of twenty years, the ratio would be 120/240. Fifty percent of the potential benefit would be marital property. The trial court would then make an equitable division of that fifty percent allotting a portion to the nonemployee spouse.” *Cohen v. Cohen*, 937 S.W.2d at 831 n. 9.

approach may be that it “requires a trial court to retain jurisdiction to oversee the payment.” *Cohen v. Cohen*, 937 S.W.2d at 831. However, “the entry of an order awarding a certain percentage of the benefits at the time of payment should lessen the administrative burden of the court.” *Cohen v. Cohen*, 937 S.W.2d at 831. Furthermore, “[c]ourts routinely retain jurisdiction to supervise payments of alimony and child support and have, in the past, successfully divided vested pension rights by awarding each spouse a share.” *Cohen v. Cohen*, 937 S.W.2d at 831.

During the February 10, 2005 hearing, the trial court considered the parties’ arguments regarding whether Ms. McFarland’s National Guard retirement benefits should be divided based upon the present cash value method or a deferred distribution approach. The circumstances of this case are such that Ms. McFarland’s retirement had not yet vested and would not for at least two more years. It also was uncertain whether she would retire as major or lieutenant colonel with this status affecting her retirement pay. Furthermore, it was unclear whether she would continue working and accumulating retirement points until age sixty or retire at age fifty-eight upon her retirement vesting. Additionally, the parties failed to provide the trial court with a clear indication of what Ms. McFarland’s exact plans were or what the exact financial impact would be of the various permutations. Given these circumstances, the trial court clearly did not abuse its discretion in opting to use the deferred distribution method rather than the present cash value method.

B.

Having upheld the trial court’s decision to employ the deferred distribution method, we now turn to Mr. McFarland’s assertion that the trial court’s calculation and apportionment of Ms. McFarland’s National Guard pension did not comply with the court’s *Croley v. Tiede* opinion. Ms. McFarland argues that Mr. McFarland cannot raise this issue now because he failed to raise it in his Tenn. R. Civ. P. 59 motion. Sensing the futility of this argument, she also candidly concedes that the manner in which the trial court applied the deferred distribution method did not comply with our *Croley v. Tiede* decision. However, she also points out that *Croley v. Tiede* also requires the trial court to factor in all the years of her creditable service following the dissolution of the marriage.

We need not tarry long with Ms. McFarland’s waiver argument. In non-jury cases, Tenn. R. Civ. P. 59 motions are permissive, not mandatory. *See McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983); *Hughes v. Cowan Stone Co.*, 766 S.W.2d 188, 192 (Tenn. Ct. App. 1988). Because a Tenn. R. Civ. P. 59 motion is not a prerequisite to an appeal from a decision in a non-jury case, requiring a party to file a Tenn. R. Civ. P. 59 motion raising all the issue the party might raise on appeal would amount to a little more than laying a trap for the unwary. *See In re Morgan*, Nos. WO-01-070, 00-18351, 2002 WL 191995, at *3 (B.A.P. 10th Cir. Feb. 7, 2002). Accordingly, we conclude that Mr. McFarland has not waived his opportunity to take issue with the trial court’s decision to calculate Ms. McFarland’s retirement based on her current rank rather than on her rank at retirement.

The trial court apparently did not factor in Ms. McFarland’s likely promotion to lieutenant colonel or her post-divorce service in the National Guard when it divided the parties’ interest in Ms.

McFarland's National Guard pension.¹¹ These oversights run afoul of our *Croley v. Tiede* decision in which we held that when a trial court employs the deferred distribution method, "the post-dissolution increases in pension benefits are to be used in calculating the benefits payable to the non-employee spouse at the time of the retirement of the employee spouse." *Croley v. Tiede*, 2000 WL 1473854, at *7. Based on the formula devised by the Colorado Supreme Court in *In re Marriage of Kelm*, 912 P.2d 545, 547 n.3 (Colo. 1996) and *In re Marriage of Hunt*, 909 P.2d 525, 531 (Colo. 1995), we held that "the numerator of the marital fraction is the number of years (or months if more accurate) that the employee spouse has earned toward the retirement pension during the marriage and the denominator is the number of years (or months if more accurate) of the employee spouse's total service toward the pension at the time that he or she retires." *Croley v. Tiede*, 2000 WL 1473854, at * 7.

As we noted in *Croley v. Tiede*, the Colorado Supreme Court concluded in *In re Marriage of Kelm* that the trial court erred by deciding the parties' respective interests in the husband's pension in advance of the husband's actual retirement date. The court noted that "[l]eaving the denominator undetermined until the receipt of benefits eliminates the need for the trial court to 'reserve jurisdiction' in the event husband takes early retirement or is subject to a reduction in force or early buy-out of his retirement benefits." *In re Marriage of Kelm*, 912 P.2d at 551. Additionally, the court observed that "the trial court's attempt to address future contingencies, which would shorten husband's period of employment, would have been unnecessary had the trial court correctly applied the deferred distribution method in the first instance." *In re Marriage of Kelm*, 912 P.2d at 551.

Accordingly, in light of our decision in *Croley v. Tiede*, we conclude that both Mr. McFarland and Ms. McFarland are correct with regard to their concerns about the manner in which the trial court undertook to divide Ms. McFarland's National Guard retirement. By opting to utilize a deferred distribution approach, the trial court erred by limiting Mr. McFarland to receiving a percentage calculated from Ms. McFarland's current rank of major thereby excluding him from receiving the benefit of any increase in her retirement based upon retiring at a higher rank. In this case, the reasons for utilizing the deferred compensation approach were the uncertainties as to whether Ms. McFarland's retirement would actually vest, what her rank would be when she retired, what the retirement payment amounts would actually be when she retired, and when she would retire. The trial court erred by combining the deferred compensation approach with an assumption that one of the various possible permutations would be the result that actually followed.

As we held in *Croley*, where the deferred distribution is utilized, the "denominator is the number of total years or total months that the employee spouse has served toward his or her pension upon his or her retirement." *Croley v. Tiede*, 2000 WL 1473854, at * 8. Thus, Ms. McFarland is correct that the trial court also erred in failing to allow the denominator to increase in accordance with a potential decision of Ms. McFarland to continue to work beyond the twenty year mark, the point at which her pension first vests. For example, if Ms. McFarland serves in the National Guard

¹¹ In its final divorce decree, the trial court found "that eighty-three (83%) percent of [Ms. McFarland's] retirement benefit at the time of vesting at present rank of Major is marital property. The Court finds that [Ms. McFarland] should vest at fifty-eight (58) years of age."

until the age of sixty, Mr. McFarland is entitled to a lesser percentage of her retirement than if she retires at the age of fifty-eight because she will have spent more time, in which she was not married to Mr. McFarland, increasing the value of her retirement pay.

The trial court awarded Mr. McFarland one-half of the marital portion of Ms. McFarland's National Guard retirement benefits. The marital portion should be determined by multiplying Ms. McFarland's monthly retirement benefit by the marital fraction. The marital fraction in this case is fifteen (the number of years of marriage) divided by X (the number of years of Ms. McFarland's actual National Guard service). Accordingly, we will not know the exact percentage until Ms. McFarland retires which is one of the reasons that the deferred compensation approach was used in this case. Mr. McFarland is entitled to one-half of the marital portion of Ms. McFarland's National Guard retirement benefit when she retires.

V.

We affirm the trial court's decision that Ms. McFarland did not contribute substantially to the appreciation in the value of the Robin Roost farm or to the lake house and the trial court's decision to employ the deferred distribution method in this case. We remand the case to the trial court with directions to vacate the portion of its final divorce decree valuing and dividing the parties' interest in Ms. McFarland's National Guard pension and to provide that the parties' respective interests in this marital property will be determined, in a manner consistent with this opinion, when Ms. McFarland retires. We also tax the costs of this appeal in equal proportions to Jerry Allen McFarland and to Pat Nichols McFarland and her surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.